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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CLIVE GORDON et al., Defendants and Appellants.	B286809 (Los Angeles County Super. Ct. No. YA095166)

APPEAL from a judgment of the Superior Court of Los Angeles County, James Brandlin, Judge. Affirmed as modified.

Alan Siraco, under appointment by the Court of Appeal, for Defendant and Appellant Clive Gordon.

Melissa L. Camacho-Cheung, under appointment by the Court of Appeal, for Defendant and Appellant Carlos Acosta.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

This appeal arises from a carjacking (count 1), robbery (count 2), and two attempted robberies (counts 3 & 4) involving three victims who were admiring a new car belonging to one of the victims. Appellants Clive Gordon and Carlos Acosta, accompanied by Cesar S., used guns to obtain cash from the car's owner. When the car spontaneously started up, Cesar S. got in and drove away in the vehicle, with at least one of appellants in the passenger seat. Appellants are gang members and the crimes were committed in territory claimed by a rival gang.

Appellants Gordon and Acosta were tried together and convicted of all four counts. (Pen. Code, §§ 211; 664/211 & 215.)[1] The jury found true allegations that the offenses were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(C). The jury also found true allegations that each appellant personally used a firearm in the commission of the count 2 robbery, the count 4 attempted robbery and the count 1 carjacking; the jury found Acosta personally used a firearm in the commission of the count 3 attempted robbery. (§ 12022.53, subds. (b) & (e)(1).) The trial court sentenced Gordon and Acosta each to a term of 25 years to life for the carjacking. The court sentenced appellants concurrently for the robbery, attempted robberies and associated enhancements -- Acosta to a term of 37 years eight months and Gordon to a term of 36 years four months.

Appellants appeal from the judgments of conviction, asserting 12 claims of error. Half of the claims relate to the trial of this matter. Gordon contends the trial court abused its discretion in admitting a video of him expressing gang-related

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

animus towards rival gangs because that video was inflammatory and had no probative value. The trial court did not abuse its discretion in finding the video relevant to prove Gordon's gang motive and intent and in concluding that probative value outweighed the potential for undue prejudice. Acosta claims his counsel was ineffective in failing to challenge the photographic lineup used by police, which Acosta characterizes as impermissibly suggestive. Acosta's counsel demonstrated a tactical reason for not making such challenge: he intended to pursue the defense that the victims deliberately misidentified Acosta. Both appellants contend the trial court erred legally and factually in permitting the jury the option of convicting them of carjacking under the natural and probable consequences doctrine. There is no rule that carjacking cannot be the natural and probable consequences of robbery; this is a fact-dependent question. There was sufficient evidence to show that Cesar S. aided and abetted appellants' robberies before he committed the carjacking, rendering him a participant in all the target crimes.

Both appellants claim the trial court erred in modifying the standard jury instruction on traditional aiding and abetting principles. It is well settled this modification does not render the instruction argumentative or misleading. Lastly appellants contend the trial court erred in instructing the jury pursuant to CALCRIM No. 315 that certainty could be considered in evaluating eyewitness testimony. Although the California Supreme Court recently granted review in a case to consider the propriety of the certainty factor, the court's prior decisions upholding the use of this factor are currently valid and we are bound by them.

The second half of appellants' claims relate to sentencing. Appellants contend the trial court erred in failing to stay their sentence on the count 2 robbery conviction pursuant to section 654. We discern substantial evidence supports a finding of multiple objectives in appellants' commission of the robbery and the carjacking. Gordon contends the trial court relied on improper factors in sentencing him to the upper term for the robbery conviction. The trial court's remarks demonstrate its decision rested entirely on two proper sentencing factors. Appellants were 18 years old at the time they committed the offenses in this case and they contend this matter must be remanded to afford them an opportunity to make a record of youth-related mitigating evidence for their eventual youthful offender parole hearing. Appellants have failed to show they were not afforded such an opportunity in the trial court.

We agree the abstracts of judgment must be corrected and the gang enhancements to the sentences on the attempted robbery convictions modified, as set forth in more detail in our disposition. We affirm the judgments of conviction in all other respects.

BACKGROUND

I. The Crimes

On September 13, 2016, between approximately 6:30 p.m. and 7:00 p.m, Joe Walker and Mercure Washington were looking at Ronald Taylor's new Mercedes convertible, which was parked on the street in front of Walker's house on West 123rd Street in Los Angeles. Taylor was in the driver's seat with the engine running, but he got out of the car to look at the trunk with Walker and Washington. Taylor left the engine running and the fob for the keyless ignition in a cup holder. The car had an

"ecosystem" which automatically turned the car off if it was stopped or if the driver left the vehicle. The car "sometimes . . . will just turn itself back on."

As the three men were looking at the trunk, a Lincoln momentarily stopped about a block away and three young men got out of the car. Victims Taylor, Walker and Washington later identified appellants Gordon and Acosta as two of the men. They also identified Cesar S., who was charged in a separate case as a juvenile. The three young men from the Lincoln walked toward Taylor, Walker and Washington. Walker observed that Gordon and Acosta were wearing Green Bay Packers jerseys; Washington noticed that Acosta was wearing a Green Bay Packers cap.

Gordon reached the car first, with Acosta a few feet behind him, and Cesar trailing behind them. Gordon said, "Nice car." Taylor thanked him. Gordon asked either "How much do you want for the car?" or "How much was the car?" Walker replied jokingly, "A hundred thousand dollars." Gordon said, "Empty your pockets then."

Taylor looked up and realized Gordon was holding a semi-automatic handgun. Taylor was unable to describe how Gordon was holding the gun. According to Washington, Gordon was holding the gun inside his jacket at about waist height. Acosta, standing slightly farther back, was pointing a semi-automatic handgun at Taylor, Walker and Washington. Taylor took about $140 to $160 in cash from his pocket and handed it to Acosta. Washington turned his pockets inside out to show he did not have any cash or valuables. Walker said, "I ain't giving you shit," and walked away to his house.

According to Washington, the Mercedes, which had earlier turned off, started up again automatically. Walker reappeared at the side of his garage and the "guys with the guns took off running." Cesar got into the driver's seat. Gordon got into the passenger seat. Acosta pointed his gun toward Walker before turning and running. As Acosta ran by Washington, Gordon yelled at Acosta to get the chain which Washington was wearing around his neck. Acosta did not do so. The Mercedes took off. Acosta continued down the street to the corner and got into the Lincoln, which had reappeared.

According to Taylor, after Walker went towards his house, the Mercedes re-started on its own. Cesar, who had been moving closer to the car during the robbery, was now by the driver's side. He got into the car. Acosta still had his gun out. According to Taylor, Acosta got into the Mercedes and as the Mercedes started to pull away, Gordon jumped into the Mercedes as well.

Taylor and Walker drove to the corner and flagged down a patrol car. Washington called 911 a few minutes after they left; the call was logged at 7:08 p.m.

II. The Investigation

About two weeks later, on September 25, 2016, police found Taylor's Mercedes on Berendo Avenue in Gardena. It had a few dings and scratches. The car was returned to Taylor, who noticed that some personal items were missing from the vehicle.

On November 2, 2016, Taylor, Walker and Washington each separately viewed a photo book with 18 photos and each identified Acosta as one of the robbers with a gun. Taylor and Washington also identified Gordon as the other robber with a gun. Taylor said he was sure of his identification. Although Walker did not identify Gordon in the photographic line up, he

was "99 percent" Gordon was one of the two armed robbers after seeing him in court. Walker testified that he selected Acosta's photo in the lineup because he "resemble[d]" one of the armed robbers, but after seeing Acosta in court Walker was "99 percent" sure of his identification. Taylor and Washington also identified Cesar as the third robber.

III. Gang Evidence

On November 10, 2016, police executed a search warrant at Gordon's residence. Police found a cell phone and several items of Green Bay Packers clothing, including caps. The cell phone contained texts, photos and videos. Police also discovered a series of texts between Gordon and Acosta on September 12, the day before the robbery, in which Acosta said he needed "a dirty thing." Gordon responded, "a toy." Acosta replied, "Yup, the cheapest one you can get." A gang expert later testified that when gang members use the word "toy," they are generally referring to a firearm.

At trial, the prosecution offered two gang-related videos of Gordon. One video was taken by a courthouse security camera on April 25, 2017. It showed Gordon drawing gang graffiti on the walls of a holding cell. According to Detective Albert Arevalo, a gang expert, the graffiti referred to both the Gardena 13 gang and to its rival, the South Los gang.

The second video came from Gordon's cell phone. In this video, Gordon stated: "Hey. . . this that fool Blackie from the Gardena Gang nigga. Fuck all our enemies! Fuck Shoelace! Fuck Tuna Fishes! Fuck French Fries nigga! Fuck seven O's nigga! Fuck all your dead homies nigga! We out of here fool. Where you fools at homie?" (Hereafter the "Blackie" video.) Officer Jason Hooker, a gang expert, testified "Shoelace" is a

disrespectful term for South Los gang members. "Tuna Fishes" is a disrespectful name for the Tortilla Flats gang, a rival of Gardena 13. "French Fries" referred to the Compton 155 gang and "Seven 0" referred to the Compton 70th Street gang. "Fuck all their dead homies" was one of the worst insults a gang member could direct at a rival gang.

The People also introduced cell phone photographs showing Gordon and friends. Gordon is wearing Green Bay Packers apparel, holding a handgun, making hand signs disrespecting South Los or making hand signs for Gardena 13. Gang expert Hooker viewed one of the photos from Gordon's cell phone and testified the men in that photo were Gordon, Acosta and Cesar. Acosta was making a hand sign and wearing a Green Bay Packers cap. Officer Hooker opined Acosta's hand sign was a "G" for Gardena 13.

Officer Hooker opined Gardena 13 gang members often wear Green Bay Packers clothing. In his opinion, appellants Gordon and Acosta were members of Gardena 13. Officer Hooker testified Gardena 13's primary activities included theft, robbery, carjacking, and murder.

Detective Albert Arevalo testified that the South Los gang claimed as its territory the area bounded by Imperial Highway, El Segundo Boulevard, Normandie Avenue, and Vermont Avenue. The scene of the crimes in this case was in South Los territory. Detective Arevalo testified South Los was a rival of Gardena 13 and during September 2016, when the crimes here were committed, the rivalry between the two gangs was "heated."

Officer Hooker opined that a carjacking and robbery committed by Gardena 13 gang members in South Los territory would be for the benefit of the Gardena 13 gang, even if South

Los gang members were not targeted and the Gardena 13 gang members did not identify themselves as such during the crimes.

IV. The Defense

Appellant Gordon did not testify and did not present evidence in his own defense.

Appellant Acosta testified. He denied participating in the robbery, attempted robberies, and carjacking. He stated he was home with his younger brothers that evening and then went to the house of a friend, Jesus Moran.

Acosta also denied being a member of the Gardena 13 gang. He wore Green Bay Packers clothing because he was a fan of the team. He spent time with friends from school who were gang members, but did not remember forming gang signs with them. Acosta acknowledged he, Gordon, and Cesar were friends. He asked his friend Gordon for a gun because he lived in a dangerous area and wanted to have peace of mind.

Acosta's friend Jesus Moran testified on Acosta's behalf. Moran brought screenshots of his September 13, 2016, Facebook messenger communications with Acosta. The screenshots show Acosta sent Moran a message at 7:11 p.m. Acosta then called Moran at 7:13 p.m. and 7:15 p.m. but Moran did not answer. Moran called Acosta at 7:16 p.m., but Acosta did not answer. They talked shortly after that and Acosta arrived at Moran's house at 7:28 p.m.

Russell Anamizu also testified on Acosta's behalf. Since childhood, Acosta had been a student at Anamizu's martial arts dojo. They had a close relationship and Anamizu would be surprised if Acosta were a Gardena 13 gang member.

V. The Additional Count Against Gordon

Gordon was also charged in this case with the attempted premeditated murder of Julio Cornelio on October 19, 2016, a different date than the carjacking and robberies. It was alleged Gordon committed the offense for the benefit of a criminal street gang within the meaning of section 186.22. Cornelio was a South Los gang member and the attempted murder took place in the heart of South Los territory. The jury found Gordon not guilty of this charge.

DISCUSSION

I. The Trial Court Did Not Abuse Its Discretion When It Admitted the Blackie Video to Show Gang Motive and Intent.

Gordon contends the trial court abused its discretion in admitting the "Blackie" video taken from his cell phone. He contends the inflammatory quality of the video outweighed its probative value. He further contends admission of the video amounted to a deprivation of his federal constitutional right to due process and a fair trial. We see no abuse of discretion and no undue prejudice to Gordon.

A. *A trial court has discretion under Evidence Code section 352 to weigh the probative value of evidence against its potential for undue prejudice.*

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

A trial court's decision under Evidence Code section 352 will not be disturbed on appeal unless the court exercised its discretion in " 'an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

B. *The trial court ruled on the admissibility of the cell phone contents as a whole.*

The prosecutor sought to introduce the video to show defendant's "motive when it comes to South Los gang and his solidarity with his gang." The People contended the video clearly showed Gordon's intent relevant to the attempted murder count. The People also argued it was relevant to show Gordon's and the gang's intent as Gordon was "leading known [gang] associates, Mr. Acosta and Cesar S., into that carjacking[.]"

For the pre-trial hearing, the parties marked the cell phone contents and records, including the "Blackie" video, as Court's Exhibit 1. The trial court ruled: "The objection as to court's Exhibit 1 in its entirety is noted for the record. It's overruled. [¶] I believe that the prejudice that may be occurring as a result of those is far outweighed by the probative value of dealing with not only the firearms allegations but also the gang allegations and intent, motive, common plan, or scheme, access to [the] firearm itself."

C. *The trial court did not abuse its discretion in finding the potential for prejudice was outweighed by the probative value of the video to show Gordon's gang motive and intent.*

It is well established that evidence of a defendant's gang affiliation can be relevant to prove the defendant's motive and intent. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) Here, Gordon was not simply expressing his personal feelings

about certain gangs, he was expressing his feelings as a gang member about rivals of his gang -- and was doing so in a disrespectful way. Gordon's attitude was relevant to establish his motive for or intent in committing subsequent crimes which disrespected a rival gang. (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 588 [evidence of defendant's threat against a member of a rival gang which contained a "gang-land" reference was relevant and admissible to show defendant's assault was "evidently not the product of a personal grievance but of [the] larger social evil" of prison gangs.].) Further, Gordon's remarks showed the strength of his commitment to his gang, which is relevant where, as here, a defendant argues at trial the alleged crimes were committed for personal reasons with friends. (See *People v. Albillar* (2010) 51 Cal.4th 47, 62–63 [prominent gang tattoos on defendants and abundant gang paraphernalia in defendants' apartment relevant to show strength of defendants' commitment to gang and to support inference defendants' offenses were gang-related].)[2]

It is also well established that even profanity-laden statements may be more probative than prejudicial. (See, e.g., *People v. Hines* (1997) 15 Cal.4th 997, 1044–1045 [tape-recorded jail conversations].) "Jurors today are not likely to be shocked by

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[2] Although the video containing gang evidence in this case was about a year old, the video was not so remote in time as to lose its probative value. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1213–1214 [threatening statement made one and one-half years before crimes not too remote to be probative].) "[W]hether the statements reflected merely a transitory state of mind, as opposed to something more [enduring], was a question for the jury to decide." (*Id.* at p. 1214.)

offensive language." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1009.) Further, the "unfortunate reality is that odious, racist language continues to be used by some persons at all levels of our society. While offensive, the use of such language by a defendant is regrettably not . . . unusual." (*People v. Quartermain* (1997) 16 Cal.4th 600, 628.)

Neither has Gordon shown undue prejudice. Here the jury unequivocally demonstrated that it was not biased against Gordon by the admission of the video. Gordon alone was charged with attempted murder with the allegation that the murder was gang-related. The evidence on that charge was weaker than on the other charges. The victim refused to testify and the testimony of the only eyewitness was weak. Despite the video, the jury acquitted Gordon of that charge.

The evidence on the carjacking and robbery charges was considerably stronger, increasing the difficulty of showing undue prejudice. The victims had a good opportunity to view Gordon; identified Gordon in a photographic lineup or at trial or both; stated that at least one of the robbers was wearing clothing associated with Gardena 13, of which Gordon was a member; and all three victims testified at trial. Evidence from Gordon's cell phone linked him to Acosta and Cesar, both of whom were identified by the victims as two of the robbers. Thus, there is no reasonable probability or possibility that the video contributed to the guilty verdicts against Gordon or that he would have received a more favorable outcome at trial in the absence of the video.

(*People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24.)[3]

The trial court's ruling that the probative value of the video outweighed its inflammatory potential was not arbitrary or capricious and the trial court did not abuse its discretion.

D. *The trial court did not admit the video for any purpose other than to show Gordon's gang motive and intent.*

Gordon argues that even if the video were properly admitted to show gang motive and intent, the trial court admitted the evidence for an additional, improper use. He claims the trial court's use of the phrase "common plan or scheme" is a reference to Evidence Code section 1101 and shows the court erroneously admitted the video as an instance of prior conduct under that section to prove defendants committed the charged acts. Gordon reads too much into this phrase, which is not used in section 1101.[4] Further, the trial court made no reference to section 1101 in its ruling and later instructed the jury, limiting its use of the video to the gang allegations.

Gordon also claims the trial court accepted the prosecution's proffer that the video showed Acosta's intent and

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[3] The application of ordinary rules of evidence like section 352 does not normally implicate the federal constitution. (*People v. Marks* (2003) 31 Cal.4th 197, 227.) We do not agree with Gordon that the improper admission of the video violated his federal constitutional rights to due process and a fair trial, and if we found error, we would find it harmless under the beyond a reasonable doubt standard applied to such violations. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

[4] The phrase is used in case law discussing Evidence Code section 1101. (See, e.g., *People v. Ewoldt* (1994) 7 Cal.4th 380.)

erroneously admitted the video for that purpose. The record does not support either part of this claim. The prosecutor argued that Acosta was following Gordon's lead, but then asked, "But what is Mr. Gordon's intent[?]" The prosecutor cannot reasonably be understood as arguing that the video is direct evidence of Acosta's intent to commit the substantive crime. The trial court made no refence to Acosta in its ruling, and did not use the words "follow" or "lead."

II. Acosta Has Not Shown His Counsel Was Constitutionally Ineffective Ii Failing to Challenge the Photographic Lineup As Suggestive.

The photographic book lineup used by police in this case contained 18 photos. Thirteen were head shots, and three were full body shots. Only one photo, a full body shot, contained two people; the two were Acosta and Cesar. Cesar was also shown in a head shot elsewhere in the book. Acosta contends the photographic "book" line-up used by police was unduly suggestive and trial counsel's failure to challenge the photographic line-ups and subsequent in-court identifications by the victims constituted ineffective assistance of counsel.

An appellant has the burden of proving ineffective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) To establish such a claim, the appellant must show that counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's error, a different result would have been reasonably probable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, at p. 694.) " ' "Because of the difficulties inherent in making the evaluation,

a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " ' " (*People v. Thomas* (1992) 2 Cal.4th 489, 530-531.)

When an appellant raises on appeal a claim of ineffective assistance of counsel, we look to see if the record contains any explanation for the challenged aspects of the representation. If the record is silent, then the contention must be rejected " 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' " (*People v. Haskett* (1990) 52 Cal.3d 210, 248.)

Here, there is evidence in the record indicating Acosta's counsel had a tactical reason for failing to challenge the line-up on the ground it was unduly suggestive. Counsel chose to challenge the victims' identification of Acosta on the theory that they were framing Acosta. An inadvertent misidentification due to a suggestive lineup would have been inconsistent with the theory of deliberate misidentification.

During the hearing on the motions in limine, Acosta's counsel explained that Acosta would be offering an alibi defense and that it was his position that when the victims of the carjacking and their gang failed to shoot Mr. Acosta sometime after the carjacking, the victims decided to identify him at the lineup. The trial court agreed to allow the defense to impeach one of the victims with prior felony convictions and an arrest for assault with a deadly weapon "given the offer of proof that this isn't just a question of mistaken identification, but it's an alleged fabrication. Therefore the witness' credibility is pivotal."

During Acosta's counsel's opening statement, counsel stated: "Basically, what we have in this case, is three dates: September 13th, 2016, October 28th, 2016, and November 2nd, 2016." He explained, "Now on October 28th, Mr. Acosta was the victim of a shooting by the South Los gang, somebody in that gang, people in that gang. [¶] Now, on September 13th, the alleged hijacking occurred. [¶] And on November 2nd, [now] two months later, the alleged victims of the carjack identify Mr. Acosta. Now that's two months later. They pick out Mr. Acosta and not hesitating, not waiting to go through the book and study it, right away they picked out Mr. Acosta, who was the victim . . . of this shooting." Counsel stated that he would present evidence that Acosta had an alibi for the time of the crimes and could not have committed them. Counsel concluded his opening statement by saying, "What the motive of the three alleged victims are in picking [Acosta] out, we'll leave to you to decide. We're going to reserve that for final argument."

During the examination of Taylor, the first of the victims to testify, Acosta's counsel asked Taylor if he had ever been a member of a gang, and if he was aware that his Mercedes was parked in South Los gang territory. Taylor denied both. Counsel then asked Taylor if he had seen Acosta before the carjacking or on October 28, 2016. Taylor again answered in the negative.

Acosta's counsel asked the next victim, Walker, about his prior conviction for burglary and if he had ever been a gang member. Walker admitted the conviction, but denied gang membership.

The next day, when Acosta's counsel cross-examined the third victim, Washington, counsel took a different approach and questioned Washington extensively about the presence or

absence of facial hair in the photos in the line-up.[5] This questioning culminated in counsel asking Washington to compare the person in photo 9-Q with Acosta and "under oath" say which one of the men was the person that pointed the gun." Washington said that the person in 9-Q was not one of the men who pointed a gun at him.

By closing argument, having apparently decided that he had not shown persuasively that the victims framed Acosta, and that the jury would view the victims as honest, counsel shifted focus to the suggestive nature of the lineup. By that point, it was too late to challenge the witnesses' identifications as tainted. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 989 [defendant's due process challenge to photographic lineup, first raised as part of motion for judgment of acquittal, was untimely and thus issue was waived].) Prudently counsel did not completely abandon his earlier argument, and continued to point to the unusual rapidity of the victims' identification of Acosta.

Although counsel's tactical choice did not work out, we " 'accord great deference to counsel's tactical decisions' [citation], and we have explained that 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight.' [Citation.] 'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' " (*People v. Weaver* (2001) 26 Cal.4th 876, 925-926.)

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[5] Acosta's counsel was unable to question the third victim, Washington, about his prior convictions because the trial court had ruled the convictions too remote to be probative.

Counsel's decision to attempt to connect the victims' identification of Acosta with a prior shooting of Acosta was consistent with Acosta's explanation that he sought a gun from Gordon for self-protection and with Acosta's alibi defense. Based on the record before us, it was a reasonable tactical decision which we will not second guess.

III. Carjacking May Be The Natural and Probable Consequence of a Robbery and the Trial Court's Instruction to That Effect Was Not Legally Erroneous.

Appellants contend the trial court erred in instructing the jury on the "legally erroneous" theory that carjacking may be a natural and probable consequence of robbery and attempted robbery. Appellants do not cite authority holding that carjacking cannot be a natural and probable consequence of robbery or attempted robbery and we are not aware of any such authority.

Acosta relies on *People v. Prettyman* (1996) 14 Cal.4th 248 for the general propositions that an aider and abettor cannot be liable for "a very serious crime" under the natural and probably consequences doctrine when the target offense was "trivial." Moreover, there is not to be a "close connection" between the two crimes. (*Id.* at p. 277.)[6] Acosta contends there is not a close connection between robbery and carjacking, and that robbery of a small amount of money is "too trivial" to make the offense of carjacking foreseeable.

We reject the argument that robbery is trivial. Robbery and carjacking are closely connected offenses. Both are forms of a taking property from a person using force or fear. Robbery may, as appellants contend, be a less serious crime than carjacking,

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6 *Prettyman* involved assault and murder.

but robbery is not a trivial offense. The seriousness of a robbery is not, as Acosta implies, reduced by the failure of the robber to obtain large amounts of cash or valuables.

Gordon relies on *People v. Leon* (2008) 161 Cal.App.4th 149 (*Leon*) to argue that carjacking was a "collateral" offense to robbery and so cannot be the natural and probable consequence of a robbery. The Court of Appeal in *Leon* held witness intimidation was not the natural and probable consequence of the crimes of auto burglary and illegal possession of a weapon because the crime of witness intimidation was not closely connected to either of those crimes and was not foreseeable under all the circumstances surrounding the target crimes. (*Id*. at pp.153, 160–161.) *Leon* involves a different set of crimes and surrounding circumstances. It has no application to the crimes and circumstances in the present case.

" '[A]lthough variations in phrasing are found in decisions addressing the doctrine—"probable and natural," "natural and reasonable," and "reasonably foreseeable"—the ultimate factual question is one of foreseeability.' [Citation.] Thus, ' "[a] natural and probable consequence is a foreseeable consequence" . . . .' (*Ibid.*) But 'to be reasonably foreseeable "[t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. . . ." [Citation.]' [Citation.] A reasonably foreseeable consequence is to be evaluated under all the factual circumstances of the individual case (*ibid.*) and is a factual issue to be resolved by the jury." (*People v. Medina* (2009) 46 Cal.4th 913, 920.)

This is especially the case with robbery, "a crime that can be committed in widely varying circumstances. It can be committed in a public place, such as on a street or in a market, or it can be committed in a place of isolation, such as in the victim's home. It can be committed in an instant, such as in a forcible purse snatching, or it can be committed over a prolonged period of time in which the victim is held hostage." (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 532.) The setting of the robbery plays a role in determining whether additional crimes are foreseeable. For example, " '[r]apes consummated during the robbery of a bank or supermarket appear to be a rarity, but rapes in the course of a residential robbery occur with depressing frequency.' " (*Id*. at p. 533.)

We hold that the offense of carjacking may be a natural and probable consequence of the offense of robbery. Whether a particular carjacking is in fact a natural and probable consequence of a particular robbery is a question for the jury to decide under the facts of the case before it.

Here, a reasonable jury could find that carjacking was a foreseeable consequence of robbery. Appellants and Cesar approached three men standing around an expensive car and directed them to empty their pockets. The total amount of money recovered was about $140-$160. A jury could find that it was foreseeable that one or more of the men would seek to take more valuable property and look to the car. Appellants contend the carjacking was a result of the car starting up on its own, which was not foreseeable. The spontaneous start-up may have prompted the carjacking, or it may have simply facilitated it. Cesar apparently moved to the driver's side of the car just before the car started and he could have done so with the pre-existing

plan of taking the car, making the car's start up a fortunate coincidence for him. Cesar might also have moved to the driver's side of the car for another reason and only decided to take the car when it self-started. This was an issue for the jury to decide.

IV. There Is Sufficient Evidence to Prove Cesar S. Aided and Abetted the Robberies Before Perpetrating the Carjacking, Which Was Sufficient Evidence to Support the Natural and Probable Consequences Instruction.

Appellants contend the natural and probable consequences instruction was factually erroneous as well as legally erroneous. In order for the natural and probable consequences doctrine to apply, a coparticipant in the robberies (the target offenses) must have committed the carjacking. Appellants contend Cesar was the perpetrator of the carjacking but there was no evidence that he aided and abetted the robberies. We find sufficient evidence of aiding and abetting by Cesar.

"[I]n general neither presence at the scene of a crime nor knowledge of, but failure to prevent it, is sufficient to establish aiding and abetting its commission. [Citations.] However, '[a]mong the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.' " (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409 (*Campbell*).)

Here, Cesar came to the scene with appellants, and all three men were dropped off very near the Mercedes. Together they walked straight toward the victims. (See *Campbell*, *supra*, 25 Cal.App.4th 402 at p. 409 [defendant "did not independently happen by the scene of the crime." He had walked by victims with his companion and then decided with the companion to return to

victims; they approached the victims together and "[t]heir concerted action reasonably implies a common purpose."].) There was ample evidence of a long-standing relationship among the three men which predated their arrival at the scene: all three men was members of the Gardena 13 gang and at least one was wearing gang clothing. They got out of the car in the territory of a rival gang. A jury could reasonably infer Cesar did not believe their common purpose was a social outing.

When Gordon and Acosta pulled out guns and approached the victims, Cesar did not remonstrate with them or walk away. Cesar positioned himself slightly back from the group, where he could see but not be seen. He remained with Gordon and Acosta throughout the robberies. (See *Campbell*, *supra*, 25 Cal.App.4th at p. 409 [defendant's lack of surprise or fear when companion pulled out a gun and announced it was a robbery and his act of staying with his companion thereafter is evidence supporting a finding of aiding and abetting].) Although Cesar began the process of fleeing the scene when he got into the Mercedes, he waited for one of the other men to get into the car before he drove off, indicating more concerted action. (See *People v. Luna* (1956) 140 Cal.App.2d 662, 665 [defendant's subsequent participation in fight with one person indicated he was not innocent bystander when codefendant started fight with another person].)

Taken as a whole, the evidence in this case is more than sufficient to show Cesar aided and abetted the robberies. (See e.g., *People v. Mitchell* (1986) 183 Cal.App.3d 325, 330 [Evidence of aiding and abetting was sufficient where defendant was present before, during and after the crime. "He was in the company of the perpetrators of the crime engaged in conversation with them at the entrance to the escalator only seconds before the

robbery plan was put in operation, and entered the escalator with them; he remained in their company during the robbery having positioned himself on the escalator in such a way as to protect them during the taking and facilitate their escape; and immediately after the taking, fled with them to his car in a nearby parking lot."]; *People v. Carlson* (1960) 177 Cal.App.2d 201, 202–203 [Evidence was sufficient to show aiding and abetting where defendant and two companions entered a liquor store. One of defendant's companions pulled out a gun and told the clerk to open the cash register. After the clerk complied, defendant's other companion forced the clerk at gunpoint into a back room. The clerk saw defendant and his companion, move forward in the direction of the cash register, but did not see what took place after that. He heard two men leave the store, and then the robber with the clerk left.].)

V. Modifying CALCRIM No. 401 Was Not Argumentative or Otherwise Improper.

Appellants contend the trial court's modification of CALCRIM No. 401 defining aiding and abetting was argumentative and improperly lightened the People's burden to prove guilt beyond a reasonable doubt, thereby violating appellants' federal constitutional rights to due process and a fair trial. We find no error.[7]

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[7] Respondent contends appellants have forfeited this claim on appeal by accepting the modified instruction. We do not agree. (See *People v. Taylor* (2010) 48 Cal.4th 574, 630, fn. 13 [defendant did not forfeit claim was impermissibly argumentative by failing to object]; § 1259.) Respondent's reliance on *People v. Lee* (2011) 51 Cal.4th 620 to show forfeiture is misplaced. The defendant in *Lee* claimed error in the trial court's *failure* to sua sponte modify

The trial court inserted the middle paragraph set out below, so that the modified instruction read in pertinent part:

> "Someone *aids and abets* a crime if he knows of the perpetrator's unlawful purpose and he specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.
>
> **"Factors relevant to determining whether a person is an aider and abettor include: presence at the scene of the crime, companionship, and conduct before or after the offense.** (Boldface added.)
>
> "If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him an aider and abettor."

Our colleagues in the Third District Court of Appeal have considered a special instruction containing virtually the same list of factors that were added to the instruction in this case. (See *People v. Battle* (2011) 198 Cal.App.4th 50, 84 (*Battle*) [Special instruction stated: " 'Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, flight, and conduct before and after the offense.' "].) We agree with their conclusion

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or amplify a correct standard jury instruction to include an expanded definition of consent based on the facts of that case. Our Supreme Court found the trial court had no such duty. (*Id*. at pp. 637–638.)

that the listing of these particular factors is not argumentative and does not invade the province of the jury "because it merely list[s] factors." (*Id*. at p. 85.)

As the *Battle* court explained: " 'An instruction is argumentative when it recites facts drawn from the evidence in such a manner as to constitute argument to the jury in the guise of a statement of law. [Citation.]' [Citation.]) An argumentative instruction is ' " an instruction 'of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' " [Citation.]' (*People v. Panah* (2005) 35 Cal.4th 395, 486 [25 Cal.Rptr.3d 672, 107 P.3d 790].) For example, in *People v. Panah,* the defense sought an instruction that stated: ' "There is evidence from which you may infer that the decedent was not alive at the time of the sodomy. This evidence includes the testimony of Dr. Heuser concerning the failure of the anal sphincter to constrict. [¶] If you find from the evidence that it was reasonably possible that decedent was dead at the time of the sodomy, you must find the special circumstance to be not true, even though there may be evidence that the deceased was alive. [¶] In order to find the special circumstance of sodomy to be true, you must find that the only reasonable interpretation of the evidence was that the deceased was alive, and this must be proved beyond a reasonable doubt." ' (*Id.* at pp. 485–486.) The Supreme Court concluded that this instruction was properly rejected because it is argumentative." (*Battle supra*, 198 Cal.App.4th at p. 85.)

There are no specific items of evidence referenced in the trial court's addition to CALCRIM No. 401 in this case. There are only "generic factors" such as "conduct." (See *Battle*, *supra*, 198 Cal.App.4th at p. 85.) As appellants acknowledge, the factors

listed are valid factors to consider in determining whether a defendant aided and abetted a crime. (*Ibid*.; see *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094–1095.) The jury was free to evaluate the evidence and determine whether defendants were aiders and abettors. (*Battle*, at p. 85.)

Acosta contends that the inclusion of the "companionship" factor was erroneous because this was a gang case, and the phrase created a risk that the jury would convict him of aiding and abetting solely on his companionship with two other gang members. Nothing in the modified instruction suggests that companionship alone is sufficient for aiding and abetting.

Acosta contends the People used the instruction to argue companionship alone was sufficient to show aiding and abetting when the prosecutor stated in closing argument: "There's aiding and abetting liability. Three Musketeers is a good reference; all for one, one for all." Acosta omits the next sentence of the prosecutor's argument: "This is a team sport." The prosecutor then explained the team concept: "One way of looking at aiding and abetting is say you look at a gang robbery with five guys. One guy's waiting in the car. *They all have a plan to rob the bank.* Four guys go in the bank. One guy puts the gun in the air, says, give us all your money or I'll shoot, and three guys who say nothing get the money. They're all working together. *They all have their different parts of the plan.* None of them as you will see actually commit a robbery by themselves. *But through their conduct with each other, they work together to complete a robbery*." (Italics added.)

The People's argument did not suggest companionship alone was sufficient for conviction, and nothing in the record suggested Acosta's only connection to the carjacking was his

companionship with the others. Acosta was not simply hanging out with his companions when they unexpectedly decided to go on a crime spree. He was actively perpetrating a robbery with them when the carjacking began. There is evidence Cesar moved closer to the car, toward the driver's side, while the robbery was still ongoing, and one victim testified Acosta got into the Mercedes with Cesar as they fled. This is substantial evidence of direct aiding and abetting. The instruction did not lighten the People's burden of proof or tip the jury's consideration of the evidence in the People's favor.

VI. CALCRIM No. 315 Remains Correct Under Current Law.

Appellants contend the trial court erred in instructing the jury with CALCRIM No. 315 which directs the jury in pertinent part: "In evaluating identification testimony, consider the following questions: [¶] . . . [¶] How certain was the witness when he or she made an identification?" Respondent contends they have forfeited their claim by failing to object.

First we address and rebuff the forfeiture argument. At the time the instruction was given, the California Supreme Court had upheld the inclusion of the certainty factor in instructions on eyewitness identification on at least two occasions. (*People v. Sanchez* (2016) 63 Cal.4th 411, 461–463; see *People v. Johnson* (1992) 3 Cal.4th 1183, 1231–1232; see also *People v. Wright* (1988) 45 Cal.3d 1126, 1144, 1165–1166 [upholding predecessor instruction to CALCRIM No. 315, including its certainty factor].) There is merit to appellants' claim that any objection would have been futile. In addition, appellants contend their substantial rights were affected by the instruction and so we may review the propriety of the instruction pursuant to section 1259 even though

appellants did not object.[8] Accordingly, we find appellants have not forfeited their claim.

Nonetheless, we must, reject the claim on the merits. We recognize the California Supreme Court granted review in *People v. Lemcke*, review granted October 10, 2018, S250108, to consider the following issue: Does instructing a jury with CALCRIM No. 315 that an eyewitness's level of certainty can be considered when evaluating the reliability of the identification violate a defendant's due process rights? At this time, however, *Sanchez* remains good law. We are bound by its holding that including the certainty factor is not error. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

VII. There Was No Prejudicial Cumulative Error in This Case.

Appellants contend the cumulative effect of the claimed errors rendered their trial fundamentally unfair in violation of their constitutional rights to due process. There is no error to cumulate. (*People v. Brents* (2012) 53 Cal.4th 599, 619 ["Because the trial court did not make multiple errors, defendant's claim of cumulative prejudice necessarily fails."].)

VIII. The Trial Court Did Not Err in Failing to Stay the Count 2 Robbery Conviction Pursuant to Section 654.

Appellants contend the trial court erred in failing to stay their sentences for their count 2 conviction for the robbery of Taylor pursuant to section 654 because those convictions were based on the same act as the count 1 carjacking convictions. The

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[8] Section 1259 provides in pertinent part: "The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

record contains substantial evidence to support the trial court's implied determination that appellants harbored multiple intents or objectives.

A. Section 654 applies to a discrete physical act or a course of conduct involving only a single objective or intent.

Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

"Whether a defendant may be subjected to multiple punishment under section 654 requires a two-step inquiry, because the statutory reference to an 'act or omission' may include not only a discrete physical act but also a course of conduct encompassing several acts pursued with a single objective. [Citations.] We first consider if the different crimes were completed by a 'single physical act.' [Citation.] If so, the defendant may not be punished more than once for that act. Only if we conclude that the case involves more than a single act—i.e., a course of conduct—do we then consider whether that course of conduct reflects a single ' "intent and objective" ' or multiple intents and objectives." (*People v. Corpening* (2016) 2 Cal.5th 307, 311.)

" 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor.' " (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.) "[I]f all of the offenses were merely incidental to, or were the means of

accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once." (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

Whether a defendant harbored a single or multiple objectives during a course of criminal conduct is a factual question for the trial court. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) We review this determination for substantial evidence and presume in support of the court's conclusion the existence of every fact the court could reasonably have deduced from the evidence. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

B. The trial court impliedly found appellants had multiple objectives and intents.

The trial court explained its decision that section 654 did not apply as follows: "[T]he court does not find that under Penal Code section 654 that [the two offenses] in fact merge. I believe that by operation of law that the robbery as to Mr. Taylor was already completed before the carjacking of Mr. Taylor did occur. So I don't think as a matter of law that the court is required to stay it." The court found it appropriate to run the sentences for the count 1 carjacking and count 2 robbery concurrently rather than consecutively.

Appellants contend that the trial court erred in finding the robbery was complete "by operation of law" because the crime of robbery is not complete until the perpetrator reaches a place of temporary safety, and the scene of the robbery is not a place of temporary safety. (*People v. Harris* (1994) 9 Cal.4th 407, 421; *People v. Ramirez* (1995) 39 Cal.App.4th 1369, 1375.) The trial court's use of the phrase "by operation of law" was perhaps unfortunate. The remainder of the court's statement indicates

the court simply meant appellants had satisfied their objective of obtaining personal property from Taylor before turning their attention to the car. As the court stated more colloquially, "the victim had already been robbed." (See *People v. Latimer* (1993) 5 Cal.4th 1203, 1208 [when trial court sentences defendant under section 654, a finding that the crimes were divisible is inherent in the record].) Thus, we find no error simply from the trial court's use of the phrase "by operation of law."

C. Appellants' use of a firearm was not a "single physical act" for purposes of section 654.

Acosta urges another ground for reversal: he claims that his use of a gun was a "single physical act" providing the force or fear for both the Taylor robbery and the carjacking. Acosta contends the reasoning of *Corpening* required the trial court to stay the sentence for the robbery conviction. The Court in *Corpening* held that if "the same action complete[s] the actus reus for each of . . . two crimes" section 654 bars punishment for both crimes. (*Corpening, supra,* 2 Cal.5th at p. 309.) The use of a gun, however, does not "complete" the actus reus for either robbery or carjacking. As the Court explained in *Corpening*, "the forceful taking of a vehicle on a particular occasion is a single physical act under section 654. The forceful taking of [the victim's] van, and the rare coins contained therein, completed the actus reus for robbery—the felonious taking of another's personal property by force. Precisely the same action, not a separate but related one taken at a separate time or in a distinct fashion, was also the basis for the contention that the defendant completed the actus reus for carjacking—the felonious taking of another's motor vehicle by force." (*Corpening*, at pp. 313–314, fns. omitted.)

Here, Taylor's cash was not inside his Mercedes and so the taking of his car did not complete the actus reus of robbery. The robbery and carjacking involved two separate but related actions undertaken consecutively, not simultaneously, and in slightly different fashions. The robbery occurred when Gordon commanded Taylor to empty his pockets, and Taylor physically handed his cash to Acosta. After this transfer was complete, Cesar took advantage of the fear created by the robbery and got into the Mercedes and drove it away. Thus, this case does not involve a single physical action which completes the actus reus of two crimes. *Corpening* does not apply.

D. There is substantial evidence that appellants had different objectives and intent in committing the carjacking than they had in committing the robberies.

Gordon contends that under any theory of the case, the carjacking was either concurrently intended with the robbery or an intended or foreseeable adjunct to the robbery. Gordon believes the jury necessarily chose one of those theories in finding Gordon guilty of carjacking and therefore implicitly found the carjacking and robbery were part of a single course of conduct pursuant to a single objective. Gordon argues that the trial court was barred from finding otherwise under either a Sixth Amendment right to jury trial or principles of due process.[9]

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[9] We question whether the right to a jury trial is implicated by a sentencing decision under section 654. Section 654 has been described as a statute that mitigates punishment. (*People v. McCoy* (2012) 208 Cal.App.4th 1333, 1339, fn. 6.) Further, the California Supreme Court has previously held that a trial court's decision to sentence consecutively does not implicate a defendant right to a jury trial because it is a " 'sentencing decision[ ] made by the judge after the jury has made the factual findings

Where a finding of a single objective is subsumed within the jury verdict "the trial court cannot countermand the jury and make the contrary finding" of multiple objectives. (*People v. Bradley* (2003) 111 Cal.App.4th 765, 770.) But where the jury has not made a specific finding of a single act or objective, the verdict does not foreclose the trial court from imposing multiple sentences for divisible acts. (See *People v. Centers* (1999) 73 Cal.App.4th 84, 101; *People v.* Nguyen (1988) 204 Cal.App.3d 181, 190.) In such a case, "the trial court is entitled to make any necessary factual findings not already made by the jury." (*People v. Centers,* at p. 101.)

This case was tried under three theories of liability: (1) Gordon was a direct perpetrator of the robberies and the carjacking; (2) Gordon was a direct perpetrator of the robberies and aided and abetted Cesar in the carjacking; or (3) Gordon was a direct perpetrator of the robberies and was liable for the carjacking under the natural and probable consequences doctrine. The same theories were argued for Acosta, who joins in Gordon's arguments here. Nothing in the jury's verdicts indicates which theory of liability it relied on in convicting Gordon or Acosta of carjacking.

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necessary to subject the defendant to the statutory maximum sentence on each offense' and does not 'implicate[ ] the defendant's right to a jury trial on facts that are the functional equivalent of elements of an offense.' " (*People v. Black* (2007) 41 Cal.4th 799, 823.) We need not reach this issue, however, as we find the trial court's rejection of section 654 is consistent with the jury verdicts.

The prosecutor's factual theory was that the three men intended to commit the carjacking when they first approached the victims, but the jury was not required to accept this factual scenario to convict appellants. Gordon argued to the jury that the robbery was complete before the carjacking began, that is, the men had achieved their objective of taking personal property from the victims and were leaving the scene when the carjacking occurred. Under this factual scenario, the spontaneous start-up of the Mercedes then gave Cesar the idea to take the car.

While a newly formed intent to steal additional property might not alone be sufficient evidence to show multiple objectives under section 654, there is more evidence than that in this case. Washington testified that when Walker came out from his house and looked around the side of his garage, the "guys with the guns took off running." Gordon went to the passenger side of the Mercedes and Cesar got into the car. Gordon got into the car and Acosta ran off down the street. The Mercedes was later found abandoned but essentially undamaged. These facts support an inference that Cesar and appellants took the car when they became concerned about Walker's return to the scene and decided to take the car to flee quickly without waiting for the Lincoln to return. This would constitute a separate objective from the robbery itself. Alternatively, the men could simply have decided to take advantage of the car's spontaneous start up. "[I]n the absence of some circumstance 'foreclosing' its sentencing discretion . . . , a trial court may base its decision under section 654 on *any* of the facts that are in evidence at trial." (*People v. McCoy*, *supra*, (2012) 208 Cal.App.4th at p. 1340.)

IX. The Trial Court Did Not Err in Imposing ihe Upper Term on Gordon for the Robbery Conviction.

Gordon contends the trial court abused its discretion in imposing the upper term for the count 2 robbery conviction because the trial court relied on aggravating circumstances which related to the gang involvement and gun use and those facts were already the basis for separate enhancements. Gordon claims the only cognizable circumstance in aggravation is his juvenile record. He maintained this factor is relatively minor and argues we may not speculate as to whether the trial court would have imposed the upper term based on this fact alone.

A. A trial court has broad discretion in determining the appropriate term for a conviction.

"When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports, . . . and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law." (§ 1170, subd. (b).)

"Even with the broad discretion afforded a trial court under the amended [2007] sentencing scheme, its sentencing decision will be subject to review for abuse of discretion. [Citations.] The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' [Citation.] As under the former scheme, a trial court will abuse its discretion under the amended scheme if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision." (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

B. The trial court did not rely on improper factors or otherwise abuse its discretion in sentencing Gordon to the upper term.

The trial court explained its sentencing choice as follows: "Mr. Gordon has a significant prior criminal record. . . . Mr. Gordon was the shot caller on this particular mission into opposing gang turf." The court also described Mr. Gordon as the more active participant in the robbery. The court also stated it agreed with four of the five factors listed in Gordon's probation report. The court did not repeat or list those factors, but the following four factors are listed: (1) the manner in which the crime was carried out indicated planning, sophistication or professionalism; (2) defendant had engaged in violent conduct that indicates a serious danger to society; (3) defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness; and (4) the defendant's prior performance on probation or parole was unsatisfactory.

Gordon is correct that some of the circumstances listed in the probation report are related to the gun use or gang enhancements. The only violent conduct in the case was the use of a gun, and the planning for the robbery was premised in part on Gordon and Acosta's texts about acquiring a gun and their plan to commit the crimes in a rival gang's territory. "[T]he court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law." (§ 1170, subd. (b).)

Gordon acknowledges, however, there is factual support for one other circumstance listed in the probation report and discussed by the trial court: his prior criminal record. He agrees this was a permissible factor to consider, but argues that we may not "speculate" whether the trial court would have imposed the upper term based solely on this factor. (*People v. Kozel* (1982) 133 Cal.App.3d 507, 540.)

We find two proper circumstances which support imposition of the upper term and further find the trial court's own remarks at sentencing demonstrate the court would have imposed the upper term based solely on those factors. The court discussed only those two factors. The first factor he identified was Gordon's prior criminal record. The trial court noted in contrast that Acosta had no prior record. The trial court also emphasized Gordon's role as the more active participant in the robbery, with Acosta following Gordon's lead. The court then sentenced Gordon to the high term and Acosta to the mid-term.

Apart from their criminal record and participation in the robbery, the "aggravating" circumstances listed for the two men in their probation reports were virtually identical.[10] This strongly indicates the trial court based its imposition of the upper term on Gordon's criminal record and leadership role, and not the factors in the probation report. Our conclusion is reinforced because the trial court repeated, immediately before sentencing Acosta to the mid-term for the robbery, that Acosta was more passive.

Gordon contends there is no factual basis for the trial court's conclusion that he was the more active, leading participant in the robbery. We find such a basis. Gordon was in the front of the group as it approached the victims, with Acosta and Cesar following. Gordon was the only one of the three robbers to speak. He initiated small talk about the Mercedes, potentially to put the victims off guard. It was he who told the victims to empty their pockets; he later told Acosta to take a chain necklace from one of the victims.

X. Three of the Gang Enhancements Must Be Modified to Avoid Double Punishment for Appellants' Use of a Firearm.

Acosta contends, and respondent agrees, that the 10-year gang enhancement terms added to his sentences for the attempted robberies pursuant to section 186.22, subdivision

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[10] Acosta's report referred to the crime involving great violence and also being carried out in a manner demonstrating planning, sophistication and professionalism. Gordon's report, as we note, also referred to violent conduct and the crime being carried out in a manner demonstrating planning, sophistication and professionalism.

(b)(1)(C), must be modified to five year terms pursuant to section 186.22, subdivision (b)(1)(B). Respondent agrees that Gordon's enhancement term on one of the attempted robberies (Count 4) must be modified as well. Respondent does not agree that Gordon's sentence on count 3 must be modified. We reach the same conclusions as respondent.

Section 1170.1, subdivision (f), prohibits the imposition of more than one enhancement for use of a firearm as to a single offense: "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury."

In *People v. Rodriguez* (2009) 47 Cal.4th 501, 504, the California Supreme Court held that section 1170.1, subdivision (f), prohibited imposition of an aggravated gang enhancement (§ 186.22, subd. (b)(1)(C)) and a firearm enhancement (§ 12022.5, subd. (a)) as part of a sentence for assault with a firearm. The Court noted that both the enhancement for personal use of a firearm under section 12022.5 and the gang enhancement fell within the scope of section 1170.1, subdivision (f). (*Rodriguez*, at pp. 505, 508.) The gang enhancement under section 186.22, subdivision (b)(1)(C), applied to the assault with a firearm conviction because it was a violent felony under section 667.5, subdivision (c)(8) (firearm use during felony). (*Rodriguez,* at p. 509.) Therefore, because section 1170.1 prohibits the imposition of two enhancements based on the same firearm use,

the Court reversed the sentence and remanded. (*Rodriguez*, at pp. 505, 509.)

Here, appellants were sentenced on counts 3 and 4 under section 186.22, subdivision (b)(1)(C) because the attempted robberies in this case were "violent" felonies. Attempted robbery is a "violent felony" only pursuant to the firearm use provision in section 667.5, subdivision (c)(8). Accordingly, the only basis for imposing the section 186.22, subdivision (b)(1)(C), gang enhancement is Gordon's and Acosta's personal use of a firearm in count 4 and appellant Acosta's personal use of a firearm in count 3. Acosta was also sentenced on counts 3 and 4 under section 12022.53, subdivision (b) for his firearm use. Gordon received a section 12022.53, subdivision (b) enhancement for his firearm use only on count 4. Under the reasoning of *Rodriguez*, the same firearm use cannot be used to impose both the firearm enhancement (§ 12022.53, subd. (b)) and the aggravated gang enhancement (§ 186.22, subd. (b)(1)(C)), and so that gang enhancement cannot be imposed.

A lesser gang enhancement is, however, permissible under the facts of this case. Appellants were convicted in counts 3 and 4 of attempted robbery, which is a "serious felony" under section 1192.7, subdivisions (c)(19) and (c)(39). Accordingly, the five-year gang enhancement under section 186.22, subdivision (b)(1)(B), applicable when the underlying felony is a "serious felony," should be imposed on count 3 for Acosta and on count 4 for both Gordon and Acosta.

Gordon's sentence on count 3 need not be modified. No firearm enhancement was imposed on that count. Gordon contends that the gang finding was used twice to increase his sentence and the principles underlying the holding in *Rodriguez*

should apply to bar such double use. The holding in *Rodriguez* is based on section 1170.1, subdivision (f), which by its terms applies to *multiple* enhancements based (directly or indirectly) on being *armed* or using a *firearm*. The language of that subdivision does not apply to multiple enhancements based on a gang finding. More importantly, Gordon did not receive multiple enhancements based on the gang finding. He received only one enhancement: the gang enhancement itself.

Acosta's sentence on counts 3 and 4 should be separate terms of eight months for the attempted robbery conviction plus three years and four months for the firearm enhancement and one year and eight months for the gang enhancement.

Appellant Gordon's sentence on count 4 should be eight months for the attempted robbery conviction plus three years four months for the firearm enhancement and one year eight months for the gang enhancement. His sentence on count 3, which consists of eight months for the attempted robbery conviction plus three years four months for the gang enhancement, remains unchanged.

XI. The Abstract of Judgment for Each Appellant Should Be Amended to Correct the Statutory Authority for the Life Terms on Count 1.

Appellants contend and respondent agrees the abstract of judgment should be corrected to show the applicable statutory authority for their sentence for the count 1 carjacking conviction. We agree as well.

In count 1, appellants were each convicted of carjacking (§ 215, subd. (a)(1)) for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). The court sentenced each appellant to 15 years to life on this count pursuant to section 186.22,

subdivision (b)(1)(5), and the minute orders and abstracts of judgment also show this same provision.

As appellants correctly point out, there is no "section 186.22, subdivision (b)(1)(5)" in the Penal Code. The correct authority for the life term with a 15-year minimum for carjacking for the benefit of a criminal street gang is section 186.22, subdivision (b)(4)(B). The abstract of judgment for each appellant should be amended to reflect the correct statutory authority for the 15-years-to-life terms on count 1. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 (*Mitchell*)[court has inherent power to correct clerical errors in its records so these records reflect the true facts; such errors may be corrected at any time]; see also *People v. Jones* (2012) 54 Cal.4th 1, 89 (*Jones*).)

XII. The Abstract of Judgment for Each Appellant Should Be Amended to Strike the Order That the Determinate Sentences Must Be Completed Before the Indeterminate Sentences.

Appellants contend the abstract of judgment should be corrected to reflect the trial court's order that the determinate and indeterminate sentences be served concurrently. Respondent agrees. We agree as well.

Acosta was sentenced to an indeterminate term of 25 years to life on count 1 and a determinate term of 37 years eight months on counts 2, 3, and 4. Gordon was sentenced to an indeterminate term of 25 years to life on count 1 and a determinate term of 36 years four months on counts 2, 3, and 4. The trial court ordered the determinate terms to be served consecutive to each other and concurrent to the indeterminate terms.

The abstracts of judgment correctly show that the indeterminate terms in count 1 are concurrent to the determinate terms in counts 2, 3, and 4. Attached to the abstracts, however, is a page titled "Other Orders." That page states, "Defendant to complete the determinate term before beginning the indeterminate sentence." This statement is inconsistent with the court's verbal pronouncement of sentence and the abstracts of judgment should be amended to delete the written statement. (*Mitchell*, *supra*, 26 Cal.4th at p. 185; *Jones*, *supra*, 54 Cal.4th at p. 89.)

XIII. Appellants Have Not Demonstrated They Were Denied the Opportunity to Make a Record for a Youth Offender Parole Hearing.

Appellants contend that this matter must be remanded under section 3051 and *People v. Franklin* (2016) 63 Cal.4th 261 to provide them sufficient opportunity to make a record of mitigating evidence for use in a future youthful offender parole hearing. Appellants have not demonstrated that they were denied such an opportunity in the trial court.

"A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was 25 years of age or younger . . . at the time of his or her controlling offense." (§ 3051, subd. (a)(1).) "[T]he board, in reviewing a prisoner's suitability for parole . . . shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c).)

In *Franklin*, the defendant was 16 years old when he committed murder and the trial court was obligated by statute to sentence him to two consecutive sentences of 25 years to life. (*Franklin*, *supra*, 63 Cal.4th at p. 268.) The defendant was sentenced in 2011, prior to the enactment of Senate Bill No. 260 on January 1, 2014. (*Franklin*, at pp. 268, 276.) Our Supreme Court determined it was not clear if the defendant had sufficient opportunity at sentencing to "make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense" to enable the Board to "properly discharge its obligation to 'give great weight to' youth-related factors." (*Id.* at p. 284.) The Supreme Court therefore remanded the case to the trial court for a determination whether the defendant had an opportunity to make this record. (*Ibid.*)

Here, appellants were 18 years old when they committed the charged offenses in September 2016. Their sentencing hearing was held in December 5, 2017, nearly two years after section 3051 was made applicable to them and 18 months after *Franklin* was decided. Appellants had sufficient opportunity to request a *Franklin* hearing and to make a record of their youthful characteristics at sentencing. The fact that they did not avail themselves of these opportunities is not a reasonable basis to conclude the trial court erred. Both appellants had the opportunity to submit sentencing memoranda detailing any mitigating evidence; Acosta in fact submitted a sentencing memorandum. At the sentencing hearing, the trial court repeatedly invited defense counsel to be heard regarding appellants' sentences. The record does not show appellants were denied the opportunity to present mitigating evidence for future use.

Appellants contend that even if there was a theoretical opportunity for them to present evidence, their trial counsel was ineffective in failing to request a *Franklin* hearing. The facts of a *Franklin* hearing do not fit easily into an ineffective assistance of counsel analysis. To use the language of such a claim, appellants have not demonstrated a reasonable probability of a more favorable outcome if counsel had requested such a hearing, that is they have not shown that there was favorable evidence to place in the record during such a hearing. Similarly, counsel may have made the reasonable tactical decision to forgo a *Franklin* hearing because counsel did not believe there was any evidence to present at such a hearing or because counsel was concerned that the risk of negative information coming to light and being memorialized at such a hearing outweighed the possible benefit from mitigating evidence. Appellants have not shown ineffective assistance of counsel.

DISPOSITION

Appellant Acosta's sentences on counts 3 and 4 are ordered modified to strike the section 186,22, subdivision (b)(1)(C) enhancement terms and to impose a subdivision (b)(1)(B) enhancement term of one year eight months for each count. Appellant Gordon's sentence on count 4 is ordered modified to strike the section 186,22, subdivision (b)(1)(C) enhancement term and to impose a subdivision (b)(1)(B) enhancement term of one year eight months for that count. The sentence on Count 3 stands.

The reference to section 186.22, subdivision (b)(1)(5) in count 1 of the abstract of judgment for each appellant is ordered corrected to section 186.22, subdivision (b)(4)(B). The notation in each appellant's abstract of judgment directing the determinate

term to be completed before the indeterminate term is ordered stricken.

The clerk of the superior court is directed to prepare an amended abstract of judgment for each appellant and to deliver a copy to the Department of Corrections and Rehabilitation.

The judgments are affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.

We concur:

GRIMES, Acting P. J.

WILEY, J.